

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT VITALE and U.S. POSTAL SERVICE,
POST OFFICE, Mauppauge, N.Y.

*Docket No. 97-1084; Submitted on the Record;
Issued December 21, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on April 18, 1995, as alleged.

On June 27, 1995 appellant, then a 47-year-old postal delivery employee, filed a notice of traumatic injury (Form CA-1) alleging that on April 18, 1995 he sustained a neck injury in a motor vehicle accident in the performance of his duty. On the reverse side of the form, the employing establishment controverted the claim stating that appellant never indicated any injury as a result of the auto accident and that his own statement was "no injury."

An accident report dated April 19, 1995 noted that no injuries were reported and the box for hospital or physician information was marked nonapplicable.

In an April 6, 1995 medical note, Dr. Ronald Richman, a Board-certified orthopedic surgeon, stated that "Patient was seen today, can only do light-duty work rest, no heavy lifting, reevaluation April 11, 1995." Dr. Richman further stated that appellant was under his professional care for low back syndrome. It is noted that this note is prior to appellant's motor vehicle accident.

In an April 26, 1995 note, Dr. Todd B. Soifer, an orthopedic surgeon, stated that appellant was examined for cervical arthritis. The work-related accident of April 18, 1995 was not mentioned.

In a May 11, 1995 note, Dr. Irwin Nelson, a Board-certified orthopedic surgeon, stated that "patient is presently partially disabled and is only able to work light duty for two weeks." The work-related accident of April 18, 1995 was not mentioned.

In a May 23, 1995 medical report, Dr. Leonard A. Pace, a physiatrist, stated that appellant was under his care for intractable neck pain and cervical derangement. The work-related accident of April 18, 1995 was not mentioned.

In a May 30, 1995 medical report, Dr. A. Lawrence Rubin, a Board-certified psychiatrist, stated that appellant was under care for major depression and panic disorder. The work-related accident of April 18, 1995 was not mentioned.

In an unsigned report dated July 3, 1995 on Dr. Soifer's letterhead, it is stated that appellant called two months later stating that he was in a car accident while working and that this is what his injuries were from.

In an August 9, 1995 report, Dr. Nelson stated that "this is an addendum to my letter dated July 3, 1995 regarding the above-named patient. It is reasonable to state from the history that the patient's preexisting condition of cervical arthritis was aggravated by the accident of April 18, 1995."

By decision dated September 13, 1995, the Office of Workers' Compensation Programs denied appellant's claim for compensation because the medical evidence was not sufficient to establish that appellant sustained an injury in the incident, as alleged.

In a letter dated July 22, 1996, appellant, through his attorney, requested reconsideration of his claim. Appellant's attorney submitted an argument alleging that the new evidence submitted on reconsideration, a May 15, 1996 report, from Dr. Enrico Fazzini satisfies appellant's burden of providing medical evidence establishing a causal relationship between his condition and the federal employment-related accident of April 18, 1995.

In his May 15, 1996 report, Dr. Fazzini noted that appellant was involved in a motor vehicle accident during the course of his federal duties on April 18, 1995. Appellant was wearing a seat belt at the time of injury, but was jolted to the side by the impact. Appellant stated that he was broad-sided by a car which was towing a trailer. Appellant related that since the accident he had not been able to work due to severe neck pain that shoots down into the left shoulder, spasmodic torticollis, and an exacerbation of his chronic lumbar radiculopathy. Dr. Fazzini set forth his examination findings and stated that appellant has a cervical radiculopathy, a post-traumatic dystonia and an exacerbation of chronic lumbar condition, all which dated from the automobile accident of April 18, 1995. He opined that, based on his examinations of appellant, a thorough review of appellant's medical history, a complete and factual history of the accident and the results of diagnostic testing, that the automobile accident of April 18, 1995 was the proximate cause of appellant's spasmodic torticollis and cervical radiculopathy. In addition, appellant's preexisting chronic lumbar radiculopathy was also exacerbated by the accident. Appellant's symptomology is consistent with an injury sustained by a sudden lateral jolt like that which appellant received when broadsided by the van.

Also submitted was a September 22, 1995 report from Dr. Susan B. Bressman, a Board-certified neurologist, which noted that appellant was under her care having been diagnosed with spasmodic torticollis, which is a chronic and painful condition of the neck. Dr. Bressman noted that appellant was initially seen on July 13, 1995. At that time, appellant had informed her of the automobile accident that took place on April 18, 1995. Dr. Bressman opined that appellant's present condition, which has prevented him from working, was exacerbated by the accident.

By letter dated August 24, 1996, the Office asked appellant to provide clarifying information pertaining to his accident. Such questions concerned appellant's delay in mentioning the motor vehicle accident as a possible contributor to his cervical condition and why there was almost a two-month delay in the mentioning of the motor vehicle accident in the medical reports.

In an undated statement signed by appellant, appellant advised that he reported an inaccurate history to the physicians consulted because he did not want the complications which might ensue with a workers' compensation claim.

By decision dated October 18, 1996, the Office reviewed appellant's claim on the merits and concluded that the evidence submitted was insufficient to warrant modification of its prior decision.

The Board finds that appellant has failed to establish that he sustained an employment injury on April 18, 1995, as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another.

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁴ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁵ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

action.⁶ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁷ Such circumstances as late notification of injury, confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case.⁸ The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.

The second requirement to establish fact of injury is that the employee must submit sufficient evidence, usually in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹ As part of this burden, the employee must submit rationalized medical evidence based upon a complete and accurate factual and medical background showing a causal relationship between the current disabling condition and the accepted employment-related condition.¹⁰

In the present case, appellant has not provided credible evidence that he sustained a cervical injury, as claimed, in the automobile sideswipe which happened on April 18, 1996. The incident was reported as a "sideswipe;" appellant reported no injury at the time of the incident, and none of the medical reports of treatment initially following the injury or for almost two months thereafter mentioned the motor vehicle accident. The Office provided appellant with the opportunity to cure the deficiencies in the claim, and appellant responded that he reported an inaccurate history to the physicians consulted because he did not want the complications which might ensue with a workers' compensation claim. Appellant's veracity is called into question, as his allegations must be consistent with all the surrounding facts and circumstances.¹¹ Although Dr. Bressman's September 22, 1995 report and Dr. Fazzini's May 15, 1996 attribute appellant's current condition to the automobile accident of April 18, 1995, the Board has held that a contemporaneous statement describing an incident is entitled to greater weight than a different description made after an interval of several months.¹² Inasmuch as appellant initially denied having sustained an injury and did not give a complete and accurate history to his treating physicians, and an interval of over two months elapsed before the automobile accident is mentioned in any of the medical reports, the Board finds from an evaluation of the total evidence

⁶ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁷ *Id.* at 255-56.

⁸ *Karen E. Humphrey*, 44 ECAB 908 (1993).

⁹ *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Herman W. Thorton*, 39 ECAB 875, 887 (1988); *Henry L. Kent*, 34 ECAB 361, 366 (1982); *Steven J. Wagner*, 32 ECAB 1446 (1981).

¹¹ *Earl F. Sutherland*, 29 ECAB 140, and cases cited therein.

¹² *See Herman Pischel*, 26 ECAB 280 (1975); *see also Vernon R. Stewart*, 5 ECAB 276 (1953).

of record, that there is no probative evidence that appellant sustained a cervical injury from his employment-related motor vehicle accident of April 18, 1995.

The decision of the Office of Workers' Compensation Programs dated October 18, 1996 is affirmed.

Dated, Washington, D.C.
December 21, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member